No. 89-7272

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

RONALD HARMELIN,

Petitioner,

—v.—

STATE OF MICHIGAN,

Respondent.

ON WRIT OF *CERTIORARI* TO THE COURT OF APPEALS OF MICHIGAN

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MICHIGAN IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 275,000 members dedicated to the principles of liberty and equality embodied in the Constitution, including the prohibition against "cruel and unusual" punishment set forth in the Eighth Amendment.

The ACLU of Michigan is a statewide affiliate of the national organization that has been involved in several challenges to the constitutionality of Section 7403 of the Michigan Controlled Substances Act.[2] That provision, which is now before the Court, imposes a mandatory sentence of life imprisonment without parole for the possession (in designated quantities) of various controlled substances.

This case therefore raises two issues of vital concern to the ACLU. First, *amici* agree with, and urge this Court to reaffirm, its holding that the proportionality of criminal sentences is a proper subject for judicial review under the Eighth Amendment. Second, *amici* believe that Section 7403 violates the Eighth Amendment when judged by the constitutional standards this Court has previously established.

STATEMENT OF THE CASE

Early in the morning of October 12, 1986, Ronald Harmelin was pulled over by two police officers for failing to stop his car at a red light in Oak Park, Michi-

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[1] *Amici* have been informed by counsel that the parties will be filing a "Joint Consent for the Filing of all Briefs *Amicus Curiae*" with the Clerk of the Court.

[2] Mich.Comp. Laws Ann. §333.7403.

gan.[3] He was eventually arrested for possession of marijuana. The arrest led to an "inventory" search of his car and the discovery of 672.5 grams of cocaine in the trunk. Harmelin was then charged with violating Section 7403 of the Michigan Controlled Substances Act, which provides that "[a] person shall not knowingly or intentionally possess a controlled substance . . . ."[4] He was *not* charged with the manufacture or sale of cocaine.[5] Nor was he charged under the section of Michigan law barring possession of a controlled substance "with intent to manufacture or deliver" it.[6]

Both before and after trial, Harmelin argued that the police conduct in his case violated the Fourth Amendment and, thus, that the narcotics uncovered by the police should have been excluded. Following his conviction, Harmelin also argued that Section 7403 violated Eighth Amendment standards by imposing a mandatory sentence of life imprisonment without parole upon any conviction for the possession of more than 650 grams of cocaine.[7]

The Michigan Court of Appeals initially agreed with Harmelin's Fourth Amendment claim and set aside his

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[3] This statement of facts is taken from the first opinion of the Michigan Court of Appeals, which is reprinted as Appendix 1 to the Petition for *Certiorari*.

[4] Cocaine is classified as a controlled substance in Section 7214(a)(iv) of the Michigan Controlled Substances Act. Mich.Comp. Laws Ann. §333.7214(a)(iv).

[5] Those crimes are covered by Section 7401 of the Michigan Controlled Substances Act. Mich.Comp. Laws Ann. §333.7401.

[6] *Id.*

[7] In addition, Harmelin received a mandatory sentence of two years imprisonment under Michigan's felony-firearm statute. Mich.Comp. Laws Ann. §750.227b.

conviction.[8] Upon reconsideration, however, that decision was reversed.[9] Harmelin's Eighth Amendment claim was then rejected in a single sentence that cited as authority a prior decision by the Michigan Court of Appeals.[10] After the Michigan Supreme Court denied leave to appeal,[11] this Court granted *certiorari* solely on the Eighth Amendment question.

SUMMARY OF ARGUMENT

This case involves a simple principle of law that is nonetheless fundamental to any system of justice: the punishment must fit the crime. In the first instance, of course, that judgment rests with the legislature. But, like all legislative judgments, it is subject to constitutional review.

Thus, this Court has consistently recognized that the Eighth Amendment's ban on "cruel and unusual" punishment incorporates the notion of proportionality. In the death penalty context, the relevance of proportionality analysis is now broadly accepted, even if its application in particular cases is still hotly disputed. *See, e.g., Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977). Outside the death penalty context, however, this Court has engaged in a vigorous debate about the propriety of proportionality review. Yet, even those members of the Court who approach such review with the greatest skepticism have acknowledged that some sentences are so out of line with prevailing standards that they cannot be reconciled with

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[8] *See* Appendix 1 to the Petition for *Certiorari*.

[9] *See* Appendix 4 to the Petition for *Certiorari*.

[10] *Id.* at 4-5.

[11] *See* Appendix 5 to the Petition for *Certiorari*.

Eighth Amendment principles. *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).

It is difficult to reach any other conclusion. The principle of proportionate sentencing dates back at least as far as the Magna Carta and, while evidence of the framers' intent on this issue is relatively scarce, there is certainly no clear indication in the constitutional debates that the framers meant to depart from this historically endorsed view when they adopted the Eighth Amendment. *Cf. Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, ___, 58 U.S.L.W. 4872, 4881 (June 21, 1990) (Scalia, J., dissenting).

The text of the Eighth Amendment also supports a role for the courts in reviewing legislative sentences. The reference to "cruel and unusual" punishments is admittedly vague, but the ban on "excessive fines" is clear and specific. Nothing in either logic or history supports a distinction between "excessive fines" and excessive imprisonment. Those who argue that the former is a matter of constitutional concern but the latter is not must, at the very least, bear the burden of justifying such a counterintuitive interpretation of the constitutional language. That burden cannot be met.

The real issue, therefore, is how to judge when a sentence becomes "excessive" under the Eighth Amendment. In resolving that question, this Court is not writing on a clean slate. Less than a decade ago, the majority in *Solem v. Helm*, 463 U.S. 277 (1983), adopted a three-part test that weighs the gravity of the offense, the sentence imposed by the same jurisdiction for other crimes, and the sentence imposed by other jurisdictions for the same crime.

That test does not unduly interfere with legislative prerogatives. To the contrary, deference to legislative judgments is built into the *Solem* test. For that reason, perhaps, *amici* have been unable to find a single prison

sentence that has been reversed in the federal courts under the *Solem* standard. The sentence in this case, however, cannot be sustained if *Solem* is to have any meaning at all.

Amici do not discount the gravity of Harmelin's offense, just as this Court did not minimize the seriousness of rape in *Coker v. Georgia*, 428 U.S. at 597-98. But the fact that an offense is serious does not mean that any and all punishments are constitutionally appropriate. In particular, this Court has frequently recognized a bright line distinction between murder and all other crimes. *Id.* at 598. Yet, the only other crime that Michigan punishes by life imprisonment without the possibility of parole is first degree murder. Second degree murder and kidnapping, among many others, are subject to less severe sentences.

The punishment Harmelin received in this case is also grossly disproportionate to what he would have received in virtually every other state in the nation. Here, as in *Solem*, Michigan can point to only one other jurisdiction that would have imposed a similar sentence on the facts of this case. The differences are dramatic in many instances. Under federal law, for example, Harmelin could not have been sentenced to more than one year in jail for possession of 672.5 grams of cocaine.

The Constitution does not require Michigan to endorse the federal government's approach to this problem. At the same time, it does not permit Michigan, or any other state, to subject its citizens to "cruel and unusual" punishment. By any objective measure, that constitutional line has been crossed in this case.

ARGUMENT

I. THE DECISIONS OF THIS COURT FIRMLY ESTABLISH THAT THE POWER OF THE LEGISLATURE TO SET CRIMINAL SENTENCES IS AND MUST BE SUBJECT TO EIGHTH AMENDMENT REVIEW

The legal issues raised by this case are indistinguishable from those decided by this Court in *Solem v. Helm*, 463 U.S. 277. Unless *Solem* is now overruled, its legal principles are therefore controlling. Those principles can be simply stated. First, the Eighth Amendment's ban on "cruel and unusual" punishment incorporates a notion of proportionality. Thus, any criminal sentence that is disproportionate to the offense violates constitutional standards. Second, it is the responsibility of the courts to enforce the relevant constitutional standard by considering: (a) the gravity of the offense; (b) the sentence imposed by the same jurisdiction for other crimes; and (c) the sentence imposed by other jurisdictions for the same crime. *Id.* at 290-92.

This standard does not interfere with legislative prerogatives except insofar as it ensures that those prerogatives are exercised in conformity with the Constitution. Under *Marbury v. Madison*, 5 U.S. 137 (1803), the courts would be shirking their duty if they did anything less. *Amici* recognize that the decision in *Solem* was not without controversy. Nevertheless, it is consistent with a body of case law that dates back to the early days of the twentieth century. It accurately reflects both the constitutional text and constitutional history. And, despite the fears of its detractors, it has not undermined the constitutional validity of legislative sentencing schemes around the country.

Although rarely invoked, *Solem* operates as an important safety valve that can and should be activated in

extreme cases. *Solem* itself was one such case; *amici* believe that this is another.

A. *Solem*'s Requirement Of Proportionate Sentencing Is Consistent With Nearly A Century Of Eighth Amendment Law

The defendant in *Solem* was convicted of uttering a "no account" check for $100 and, without enhancement, would have faced a maximum sentence of five years in prison and a $5000 fine. 463 U.S. at 281. Because of a prior criminal record,[12] however, he was treated as a recidivist under South Dakota law and sentenced to life imprisonment without parole.[13]

In overturning that sentence, this Court relied on a series of decisions, beginning with *Weems v. United States*, 217 U.S. 349 (1910). The *Weems* Court deemed it "a precept of justice that [the] punishment for crime should be graduated and proportioned to [the] offense." *Id.* at 367.[14] Applying that principle to the facts before it, the Court then held that a sentence of fifteen years hard labor in chains was disproportionate to the offense of falsifying public documents. Part of the Court's concern was undoubtedly based on the method of punishment, which bordered on the torturous. But part of the

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[12] His prior criminal record consisted of six convictions for what this Court characterized as "nonviolent felonies," including third degree burglary, obtaining money under false pretenses, and driving while intoxicated. 463 U.S. at 280.

[13] Like the defendant in this case, the defendant in *Solem* was theoretically eligible for a pardon by the governor. 463 U.S. at 282.

[14] The principle that grossly disproportionate sentences violate the Eighth Amendment was first articulated by Justice Field, who dissented in *O'Neill v. Vermont*, 144 U.S. 323 (1892), on the ground that the Eighth Amendment barred "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Id.* at 339-40.

Court's concern also involved the length of punishment. As the Court noted in *Weems*, a fifteen year sentence was "cruel in its excess of imprisonment." 217 U.S. at 377.

Fifty years later, the Court reached a similar conclusion on very different facts in *Robinson v. California*, 370 U.S. 660 (1962). The defendant in *Robinson* was sentenced to ninety days in jail for being a drug addict.[15] The Court stressed, however, that judgments about proportionality cannot be made in a vacuum. As the Court explained:

> [I]mprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold.

Id. at 667.

Following *Robinson*, the question of proportionality has most often arisen in a death penalty context. In *Coker v. Georgia*, 433 U.S. at 592, the Court held that the "sentence of death is grossly disproportionate and excessive punishment for the crime of rape." Likewise, in *Enmund v. Florida*, 458 U.S. 782, the Court held that the crime of felony murder cannot be punished by death unless the state proves beyond a reasonable doubt that the

[15] The holding in *Robinson* rested on Fourteenth Amendment grounds. Its rationale, however, has been incorporated into this Court's Eighth Amendment jurisprudence. *Solem*, 463 U.S. at 287.

defendant intended the murder as well as the predicate felony.[16]

The notion of proportionality review is thus well entrenched in this Court's Eighth Amendment jurisprudence. *Rummel v. Estelle*, 445 U.S. 263, represents the one significant exception in the past eighty years.[17] *Rummel*, of course, has since been superseded by *Solem*. Even *Rummel*, however, did not reject the notion of proportionality entirely. To the contrary, the majority in *Rummel* conceded that "a proportionality principle would . . . come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment." 445 U.S. at 274 n.11.

The hypothetical offered by the *Rummel* majority was obviously intended as an "extreme example." *Id.* Nevertheless, it substantially qualifies the otherwise broad language of the majority opinion. Once the concession is made that some prison sentences would be constitutionally excessive, it is no longer possible to maintain that "the length of the sentence actually imposed is *purely* a matter of legislative prerogative." 445 U.S. at 274 (emphasis added).

Furthermore, the *Rummel* Court's reference to an "extreme example" is, at bottom, not all that much different from this Court's consistent admonition in *Solem* and

[16] Numerous opinions of this Court between *Robinson* and *Enmund* referred to the fact that disproportionate punishment violates the Eighth Amendment. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *Gregg v. Georgia*, 428 U.S. 153, 171-72 (1976)(opinion of Stewart, Powell and Stevens, JJ.); *Hutto v. Davis*, 454 U.S. 370, 374 (1982)(per curiam). Some of those cases have involved the death penalty; others have not.

[17] In *Graham v. West Virginia*, 224 U.S. 616 (1912), the Court rejected a proportionality challenge in a single conclusory sentence that most plausibly rested on the fact that the Eighth Amendment had not yet been applied to the states.

elsewhere that prison sentences should not be overturned unless they are "grossly" disproportionate. No one suggests otherwise. The critical question, therefore, is what criteria to use in determining when the legislature has overstepped its constitutional bounds. *Rummel* proposes no criteria. *Solem* establishes its previously described three part test. In our view, that test is consistent with history and the constitutional text. It also provides a workable standard that judges can and have applied in an objective fashion.

B. The Decision In *Solem* Faithfully Reflects The Constitutional Text And Its Relevant History

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Obviously, the reference to "cruel and unusual" punishment is less specific than the reference to "excessive bail" and "excessive fines." But despite the different phraseology, this Court has had no difficulty concluding that the Amendment, as a whole, was designed to impose "parallel limitations" on bails, fines, and other punishments. *See Ingraham v. Wright*, 430 U.S. at 664. The logic of that position is unassailable. As this Court noted in *Solem*:

> It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of prison were not.

463 U.S. at 289.

At a minimum, the burden should be placed on those who advocate such a counterintuitive interpretation of the constitutional text to establish its historical basis.

In fact, the history surveyed in *Solem* and elsewhere demonstrates that the notion of proportionality was "deeply rooted and frequently repeated" in the common law by 1791. 463 U.S. at 284.

This principle stems at least as far back as the Magna Carta, which established the right against excessive "amercements" or fines in 1215. *Id.*[18] As prison sentences became more common in later years, the English courts were equally insistent that "imprisonment ought always to be according to the quality of the offence." *Hodges v. Humkin*, 80 Eng.Rep. 1015, 1016 (KB 1615). In 1689, the English Bill of Rights adopted the reference to "cruel and unusual" punishment that was repeated verbatim by the framers of the Eighth Amendment. Only three months later, that language was interpreted by the House of Lords, which declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon was excessive and exorbitant, against magna charta, the common right of the subject, and the law of the land." *Earl of Devon's Case*, 11 State Tr. 133, 136 (1689), *quoted in Solem*, 463 U.S. at 285.[19]

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[18] Chapter 20 of the Magna Carta provided that "a free man shall not be amerced for a trivial offense, except in accordance with the degree of the offense . . . ." *Solem*, 463 U.S. at 284 n.9. *See also* Granucci, "'Nor Cruel and Unusual Punishments Inflicted': The Original Meaning," 57 Cal. Law Rev. 839, 844 (1969).

[19] In addition, the Enlightenment philosophers read by the framers argued in favor of proportionate sentencing, including Montesquieu and Beccaria. *See* Schwartz and Wishingard, "The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. U.S. Excessive Punishment Doctrine," 24 Buffalo Law Rev. 783, 811 (1975). The influence of Montesquieu and Beccaria on the framers is generally discussed in B. Bailyn, *The Ideological Origins of the American Revolution* (1967). *See also Ullman v. United States*, 330 U.S. 442, 450 (1956)(Douglas, J. dissenting)("the Italian jurist Beccaria and his French and English followers influenced American thought in the critical years following our Revolution").

The principle of proportionality was also reflected in the colonial laws, which served as the source of many constitutional provisions. The Maryland Charter of 1632, for example, authorized penalties if "the Quality of the offence require it." *See* Perry, *Sources of Our Liberties* 107 (1959). The Massachusetts Body of Liberties of 1641 allowed whipping only if the "crime be very shamefull." *Id.* And the Charter of Rhode Island (1663) explicitly extended proportionality to prison sentences, requiring "the imposing of lawfull and reasonable ffynes, mulcts, and imprisonments . . . ." *Id.* at 173.

Following independence, numerous state constitutions adopted a similar view. The Pennsylvania Constitution of 1776 called for a revision of the penal system to make "punishments in some cases less sanguinary and in general more proportionate to the crime." Pa.Const. §38 (1776). The South Carolina Constitution also advocated reform to make punishments "more proportionate to the crime." S.C.Const. §XL (1776). And the New Hampshire Constitution spelled out at length the rationale for proportionate punishment:

> All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye . . . .

N.H.Const., Bill of Rights, §18 (1783).[20]

There is no reason to believe that the framers of the Eighth Amendment intended to break from this historical tradition when they adopted the constitutional bar on "cruel and unusual" punishments.[21]

C. The Solem Standards Have Proved Eminently Workable And Have Not Produced A Flood Of Litigation

The possibility that *Solem* would "flood the appellate courts with cases in which . . . arbitrary lines must be drawn" has not materialized. *Solem*, 463 at 315 (Burger, C.J., dissenting). In the seven years since the

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[20] *See generally* Schwartz and Wisingard, *supra* n.19, at 819-26.

[21] The dissenters in *Solem* argued that the "cruel and unusual" punishment clause referred only to "prohibiting the kind of torture meted out during the reign of the Stuarts." 463 U.S. at 312. Proponents of this view have principally relied on three statements by the framers. *See, e.g.*, Granucci at 840-42. In the Massachusetts Ratifying Convention in June 1788, Abraham Holmes protested that "there is no constitutional check of punishments but that racks and gibbets may be amongst the most mild instruments of their discipline." 2 J. Elliot, *The Debates In the Several State Conventions on the Adoption of the Federal Constitution* 111 (2d ed. 1881). At the Virginia Ratifying Convention in June 1788, Patrick Henry declared: "What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishments." 3 J. Elliot, *supra*, at 447-48. In the first Congress in 1789, Mr. Livermore objected to the Eighth Amendment on the grounds that "it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off . . . ." 1 *Annals of Cong.* 782-83 (1789).

As Justice Brennan noted in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 260 (1972),"[i]t does not follow [from these three statements] that the framers were exclusively concerned with prohibiting torturous punishments," only that "torturous punishments" were among their concerns. In any event, three isolated statements scarcely diminish from the general thrust of the historical evidence.

Court's ruling in *Solem*, not one prison sentence has been reversed in the federal courts on the basis of the *Solem* standard.[22]

Thus, the federal courts have not "bald[ly] substitut[ed]" their own "subjective moral values for those of the legislature." *Id.* at 314 (Burger, C.J., dissenting). Nor have the courts interpreted *Solem* as a general license to second guess the sentencing judgment of elected legislatures. Rather, the federal courts have demonstrated time and again that they are "capable of applying Eighth Amendment law to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy." *Rummel*, 445 U.S. at 306 (Powell, J., dissenting).

In short, *Solem* established an Eighth Amendment standard that reflects constitutional values and that works in practice. There is no need either to reexamine or to question it. There is, unfortunately, a need to apply it.

II. PETITIONER'S SENTENCE TO LIFE IMPRISONMENT WITHOUT PAROLE SHOULD NOT BE UPHELD UNDER THE *SOLEM* STANDARDS

Petitioner was convicted for possession of 672.5 grams of cocaine. Under Michigan law, the trial judge had no choice but to sentence him to life in prison. This sentence did not depend on a finding that petitioner engaged in the manufacture, sale, or distribution of narcotics. Petitioner was not even charged with such crimes.

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[22] This conclusion is based upon review of all published federal court opinions mentioning *Solem* (116 appellate and 35 district court decisions). *Amici* have been able to find only one case in which *Solem* was cited by a district court to overturn a criminal sentence and that decision was later reversed on appeal. *See Sutton v. State of Md.*, 681 F.Supp. 291 (D.Md. 1988), *rev'd en banc*, 886 F.2d 708 (4th Cir. 1989).

It did not depend on a finding that petitioner is a recidivist, and no such finding was made. Nor did it contemplate petitioner's early release on parole. To the contrary, parole is prohibited under these circumstances.

The severity of petitioner's sentence, therefore, is not a matter for serious dispute. In particular, the absence of even the possibility of parole means that the petitioner here, like the defendant in *Solem*, can expect to "spend the rest of his life in the state penitentiary." 463 U.S. at 297.[23] And while the petitioner here, like the defendant in *Solem*, can seek commutation of his sentence,

> [t]he possibility of commutation is nothing more than hope for "an ad hoc exercise of clemency." It is little different from the possibility of executive clemency that exists in every case in which a defendant challenges his sentence under the Eighth Amendment. Recognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless.

Id. at 303.

The fact that petitioner was *not* sentenced as a recidivist is also relevant in weighing the punishment he received. As this Court explained in *Rummel*, the state's interest in punishing a recidivist is different than its interest in punishing a first time offender:

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[23] By contrast, the defendant in *Rummel* was eligible for parole after serving twelve years of his life sentence, a fact that this Court emphasized in *Solem*. 463 U.S. at 302.

> [A] recidivist [under Texas law] must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released. One in Rummel's position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail. [The Texas statute] thus is nothing more than a societal decision that when such a person commits yet another felony, he should be subjected to the admittedly serious penalty of incarceration for life, subject only to the State's judgment as to whether to grant him parole.

445 U.S. at 279 (footnote omitted).

Amici do not suggest that petitioner's crime is in any way comparable to the petty thefts at issue in *Rummel* and *Solem*. It is not. Petitioner was convicted of a serious offense. Nevertheless, the special concerns associated with recidivism cannot be used to justify the punishment imposed in this case. Absent the enhancing factor of recidivism, petitioner's sentence is grossly disproportionate both to the range of sentences imposed by Michigan for other serious crimes and to the sentence that petitioner would have received if convicted of the same crime in virtually every other jurisdiction.

A. Michigan's Sentencing Structure

Life imprisonment without parole is the most severe sentence that any defendant can receive in the state of

Michigan for any crime.[24] In petitioner's case, it was a mandatory sentence.[25] Only two other crimes in Michigan carry a similar penalty: first degree murder,[26] and the manufacture or sale of more than 650 grams of a Schedule 1 or 2 drug.[27] By contrast, second degree murder, kidnapping, and hostage-taking by prisoners carry a minimum sentence of "life or any term of years."[28] Assault with intent to maim is punishable by ten years in prison.[29] Assault with a dangerous weapon is punishable by four years in prison.[30]

Amici fully appreciate the difficulty of placing a moral and penal value on different crimes. At the same time, the Court's Eighth Amendment cases have consistently recognized a bright line between premeditated murder and all other offenses. For example, in *Coker v. Georgia*, 433 U.S. 584, the Court held that rape could not be punished by the death penalty. The Court's holding was clearly not intended to "discount the seriousness of rape," *id.* at 597, just as *amici* do not discount the seriousness of petitioner's conviction in this case. Never-

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[24] Michigan does not have a death penalty.

[25] *See* n.2, *supra*.

[26] Mich.Comp. Laws Ann. §750.316.

[27] Mich.Comp. Laws Ann. §333.7401.

[28] Mich.Comp. Laws Ann. §§750.31, 750.349, 750.349a. The Michigan courts have interpreted the phrase "life or any term of years" to mean a mandatory minimum of one year and one day imprisonment. *People v. West*, 317 N.W.2d 261 (1982); *People v. Harper*, 269 N.W.2d 470 (1979). Furthermore, Michigan law provides that a prisoner "under sentence for life or for a term of years" is eligible for parole after ten years. Mich.Comp. Laws Ann. §791.234(4).

[29] Mich.Comp. Laws Ann. §750.86.

[30] Mich.Comp. Laws Ann. §750.82.

theless, the Court insisted that a distinction between rape and murder was appropriate:

> Rape is without doubt deserving of serious punishment, but in terms of moral depravity and the injury to the person and the public, it does not compare with murder, which does involve the unjustified taking of human life.

Id. at 598.

A similar rationale applies to the facts of this case. Indeed, any other result would be inconsistent with the very premise of proportionate sentencing and, consequently, inconsistent with the demands of the Eighth Amendment.[31]

B. The Practice In Other Jurisdictions

For the Court's convenience, *amici* have compiled a list of the maximum sentence that petitioner could have received had he been tried for the same crime by any other state. *See* Appendix 1a-5a.[32] That list makes clear that Michigan's mandatory sentence of life imprisonment without parole is the harshest in the nation. It is, moreover, the harshest by a considerable margin. Only Alabama imposes a similar punishment. In more than half the states, petitioner could not have been sentenced to more than ten years in jail and in at least two states his maximum sentence would have been six months. Thus, as in *Solem*, the defendant in this case "could not have received such a severe sentence in 48 of the 50 States." 463 U.S. at 299.

The comparison with federal law is even more illuminating. Had petitioner been tried for possession of 672.5 grains of cocaine in federal court, he could not have been sentenced to more than one year in jail, 21 U.S.C. §844(a), and even that sentence is discretionary. As a first offender, petitioner could also have been placed on probation and, upon successful completion of his probationary term, all charges against him would have been dropped. 21 U.S.C. §844(b).[33]

In short, petitioner would probably not be in jail today had he been prosecuted by the federal government. Because he was prosecuted by the state of Michigan, he will never get out of jail for the remainder of his life. These are not simply differences in degree; they are differences in kind. It is one thing to say that the states can act as laboratories in addressing difficult social issues. It is another thing to say that one or two states can impose criminal punishments that are so out of line with the national consensus. Such radical disparities cannot and should not be upheld under the Eighth Amendment.

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[31] There is another significant disproportionality inherent in Michigan's sentencing scheme. Michigan has chosen to punish simple possession of narcotics as severely as it punishes their manufacture or sale (above 50 grams). This produces two complementary results, neither of which can be justified in logic or law. It eliminates any disincentive against drug sales while relieving the state of the necessity of proving an intent to sell.

[32] It is important to note that the Appendix lists the *maximum* possible sentence for each jurisdiction. In Michigan, of course, the maximum sentence is also the mandatory sentence. The mandatory nature of Michigna's sentencing scheme simply ignores "the need for individualized sentencing decisions" that the Court has referred to in its Eighth Amendment opinions. *See Solem*, 463 U.S. at 290 n.17.

[33] Under the federal sentencing guidelines, a first offender found guilty of the more serious crime of possession with intent to distribute 672.5 grams of cocaine, 20 U.S.C. §841(b)(1)(B), would still face only 63-78 months in jail.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

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APPENDIX

STATE-BY-STATE LIST OF MAXIMUM POSSIBLE SENTENCES FOR POSSESSION OF 670 GRAMS OF A MIXTURE CONTAINING COCAINE•

Alabama Ala.Code §§13A-5-6(a)(1), 13A-12-231(2), (10), 13A-12-232 (1982 & Supp. 1989)	life w/o parole
Alaska Alaska Stat. §§11.71.040(a)(3)(A), (d), 12.55.125(e) (Supp. 1988)	5 years
Arizona Ariz.Rev.Stat.Ann. §§13-3408(A)(1), (B)(1), 13-701(c)(3) (1989)	4 years
Arkansas Ark.Stat.Ann. §5-64-401(a)(1)(i), (d) (1987)	life
California Cal. Health & Safety Code §11350(a) (West Supp. 1989); Cal. Penal Code §18 (West 1988)	3 years
Colorado Colo.Rev.Stat. §§18-18-105(1)(a), (2)(a)(I), 18-1-105(1)(a)(IV) (1986)	16 years
Connecticut Conn.Gen.Stat. §21a-279(a) (1989)	7 years

• *Amici* have listed only maximum sentences to avoid any claim that the *Solem* analysis set forth in this brief has been weighted in petitioner's favor. It is important to note, nonetheless, that the maximum sentence is rarely imposed on first offenders in most jurisdictions. In Michigan, it is mandated by statute.

Delaware Del.Code Ann. tit.16, §4753A(a)(2) (1983), tit.11, §4205(b)(2) (1987)	30 years
District of Columbia D.C. Code Ann. §33-541(d) (1988)	1 year
Florida Fla.Stat.Ann. §§893.13(1)(f), 775.082 (3)(d) (West 1976 & Supp.1990)	5 years
Georgia Ga.Code Ann. §16-13-31(a)(1), (f) (1988)	30 years
Hawaii Haw.Rev.Stat. §§712-1241(1)(a)(ii), (2), 706-659 (1985 & Supp. 1989)	20 years
Idaho Idaho Code §37-2732(c)(1) (1977)	3 years
Illinois Ill.Ann.Stat. ch.56½, ¶1402(a)(2)(C) (Smith-Hurd Supp. 1990)	40 years
Indiana Ind.Code Ann. §§35-48-4-6(a), (b)(1), 35-50-2-6 (Burns 1985 & Supp. 1990)	5 years
Iowa Iowa Code Ann. §§204.401(3), 903.1(1)(b) (West 1987 & Supp. 1990)	1 year
Kansas Kan.Stat.Ann. §§65-4127a(a), 21-4501(c) (1988 & Supp. 1989)	20 years
Kentucky Ky.Rev.Stat.Ann. §§218A.140(2), 218A.990(7) (Baldwin 1982)	5 years

Louisiana La.Rev.Stat.Ann. §40:967(F)(1)(c) (West Supp. 1990)	30 years
Maine Me.Rev.Stat.Ann. tit.17-A, §§1103, 1252(2)(B) (1983 & Supp. 1989)	10 years
Maryland Md.Ann.Code art.27, §287(a), (e) (1987)	4 years
Massachusetts Mass.Gen.Laws Ann. ch.94C, §34 (West 1984)	1 year
Michigan Mich.Comp.Laws Ann. §§333.7403(1), (2)(a)(i), 333.7401(3) (West 1980)	life w/o parole
Minnesota Minn.Stat.Ann. §152.021 (West Supp. 1990)	30 years
Mississippi Miss.Code Ann. §41-29-139(c)(1) (Supp. 1990)	3 years
Missouri Mo.Ann.Stat. §§195.202, 558.011(1)(3) (Vernon 1979 & Supp. 1990)	7 years
Montana Mont.Code Ann. §45-9-102(1), (4) (1989)	5 years
Nebraska Neb.Rev.Stat. §§28-416(3), 28-105(1) (1989)	5 years
Nevada Nev.Rev.Stat.Ann. §453.3395(3) (Michie 1986)	life

New Hampshire N.H.Rev.Stat.Ann. §§318-B:26(II)(a), 651:2(II)(b) (1986 & Supp. 1989)	7 years
New Jersey N.J.Stat.Ann. §§2C:35-10(a)(1), 2C:43-6(a)(3) (West 1982 & Supp. 1990)	5 years
New Mexico N.M.Stat.Ann. §30-31-23(A), (B)(4) (1989)	1 year
New York N.Y. Penal Law §§220.21 (McKinney 1989), 70.00(2)(a) (McKinney 1987)	life
North Carolina N.C.Gen.Stat. §§90-95(h)(3)(c), 14-1.1(a)(4) (1986 & Supp. 1989)	40 years
North Dakota N.D.Cent.Code §§19-03.1-23(3), 12.1-32-01(4) (1985 & Supp. 1989)	5 years
Ohio Ohio Rev.Code Ann. §§2925.03(A)(6), (C)(5), 2929.11(B)(5) (Anderson 1987)	15 years
Oklahoma Okla.Stat.Ann. tit.63, §2-402(A)(1), (B)(1) (West Supp. 1990)	10 years
Oregon Or.Rev.Stat. §§475.992(4)(b), 161.605(3) (1989)	5 years
Pennsylvania Pa.Stat.Ann. tit.35, §780-113(a)(16), (b) (Purdon Supp. 1990)	1 year
Rhode Island R.I.Gen.Laws §21-28-4.01(C)(1)(a) (1989)	3 years

South Carolina S.C.Code Ann. §44-53-370(e)(2)(e) (Law. Co-op. Supp. 1989)	30 years
South Dakota S.D.Codified Laws Ann. §§22-42-5, 22-6-1(7) (1988)	5 years
Tennessee Tenn.Code Ann. §§39-17-418(a), (c), 40-35-11(e)(1) (Supp. 1989)	11 months, 29 days
Texas Tex. Health & Safety Code Ann. §481.115(a), (c), (d)(2) (Vernon 1990)	life
Utah Utah Code Ann. §§58-37-8(2)(a)(i), (b)(ii), 76-3-203(3) (1990)	5 years
Vermont Vt.Stat.Ann. tit.18, §4231(a)[4] (Supp. 1989)	20 years
Virginia Va.Code Ann. §§18.2-250(A)(a), 18.2-10(e) (1988 & Supp. 1990)	10 years
Washington Wash.Rev.Code Ann. §69.50.401(d) (Supp. 1990)	5 years
West Virginia W.Va.Code §60A-4-401(c) (1989)	6 months
Wisconsin Wis.Stat.Ann. §161.41(3m) (West 1989)	1 year
Wyoming Wyo.Stat. §35-7-1031(c) (1988)	6 months